

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

**RICHARD G. TATUM, individually and on)
behalf of a class of all other persons)
similarly situated,)**

Plaintiff,)

v.)

**R.J. REYNOLDS TOBACCO COMPANY,)
et al.)**

Defendants.)

Civil Action No. 1:02 CV 00373

**MEMORANDUM OF LAW IN
SUPPORT OF PLAINTIFF’S
MOTION TO STRIKE
DEFENDANTS’ SUGGESTION OF
ADDITIONAL AUTHORITY**

Plaintiff hereby moves to strike Defendants’ Suggestion of Subsequently Decided Authority (Dkt #394), filed July 7, 2010. Because Defendants have submitted non-controlling authority and have inappropriately offered argument about that authority, Plaintiff requests that the Court strike Defendants’ filing or accept Plaintiff’s Objection (attached as Exhibit A), explaining the inapplicability of the cases submitted.

As Plaintiff has previously briefed (Dkt. #284), only one provision in the Local Rules for the Middle District of North Carolina allows a party to submit additional authority after briefing has concluded on a motion: Local Rule 7.3(i). Local Rule 7.3(i) provides for “a suggestion of subsequently decided *controlling* authority, without argument” as an “addendum to a brief.” (Emphasis added.) Local Rule 7.3 further states that the suggestion shall “contain only the citation to the case relied upon, if published, or

a copy of the opinion if the case is unpublished.” There is no other provision in the local rules for additional briefing.

Defendants’ Suggestion cites and provides argument about five additional decisions—one unpublished Fourth Circuit case, one Middle District of North Carolina decision by Magistrate Judge Auld, and three out-of-circuit cases including two district court decisions. None are controlling authority. *See John S. Clark Co. v. United Nat’l Ins. Co.*, 304 F. Supp. 2d 758, 761 n.1 (M.D.N.C. 2004) (only controlling authority is appropriate under Local Rule 7.3); *Halpern v. Wake Forest Univ. Health Sci.*, No. 1:09-CV-474, 2010 WL 2650842, at *10 (M.D.N.C. July 1, 2010) (noting that unpublished circuit court decisions are not binding on the district court). Moreover, the cases are inapplicable. As set forth in Plaintiff’s Objection, none of them involves leave to amend under Federal Rule of Civil Procedure 15(b)(2) in a situation similar to this case, where Plaintiff seeks not to add a new legal theory, but to amend the pleadings in support of his originally pleaded claim, with facts established by evidence *defendants* introduced at trial, and where no further discovery or evidence is needed to support the amendment.

For the foregoing reasons, Plaintiff requests that the Court strike Defendants’ Suggestion of Additional Authority or, in the alternative, that Plaintiff be permitted to respond to Defendants’ argument with Plaintiff’s Objection, attached as Exhibit A.

Dated: July 14, 2010

Respectfully submitted,

By: /s/ Robert M. Elliot
Robert M. Elliot

State Bar No. 7709
Helen Parsonage
Elliot Pishko Morgan, PA
426 Old Salem Road
Winston-Salem, NC 27101
Telephone: (336) 724-2828
Facsimile: (336) 714-4499

By: /s/ Catha Worthman
Jeffrey Lewis
Bill Lann Lee
Catha Worthman
Julia Campins
Lewis, Feinberg, Lee, Renaker
& Jackson, P.C.
1330 Broadway, Suite 1800
Oakland, CA 94612
Telephone: (510) 839-6824
Facsimile: (510) 839-7839

Kelly M. Dermody
Daniel M. Hutchinson
Lief Cabraser Heimann &
Bernstein, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Daniel R. Taylor, Jr.
Adam H. Charnes
Tonya Deem
Chad D. Hansen
James J. Hefferan, Jr.
Kilpatrick Stockton, LLP
1001 West Fourth Street
Winston-Salem, NC 27101

Attorneys for Defendants

By: /s/ Catha Worthman
Julia Campins
Lewis, Feinberg, Lee, Renaker
& Jackson, P.C.
1330 Broadway, Suite 1800
Oakland, CA 94612
Telephone: (510) 839-6824
Facsimile: (510) 839-7839